



Federal Communications Commission
Washington, D.C. 20554

DA 10-1457
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ETC Communications, Inc.
c/o Nathaniel J. Hardy, Esq.
Wood, Maines & Nolan, P.C.
4121 Wilson Boulevard
Suite 101
Arlington, Virginia 22203-4143

Re: DWYLE(TV), Florence, Alabama
File Nos. BLSTA-20070308ABE;
BALCT-20070802ADK; BMPCDT-
20070920ABE; BLSTA-20080207AOM;
BEPCDT-20080818ACX
Facility ID No. 6816

Dear Counsel:

This is with respect to the petition filed by ETC Communications, Inc. ("ETC") seeking reconsideration of the Video Division's March 12, 2009 letter decision¹ cancelling the analog license and digital construction permit for station WYLE(TV), Florence, Alabama (the "Station"), deleting the call sign and dismissing the above-referenced applications.

Background. Commission records show that the Station was taken off the air on February 8, 2007.² On February 7, 2008, ETC notified the Commission that the Station had resumed broadcasting on February 3, 2008, but ceased operations the next day. ETC also filed on February 8, 2008 the above-referenced request for the station to remain dark. By letter dated May 2, 2008, the staff requested information regarding the Station's operations, noting that Section 312(g) of the Communications Act³ provides that:

If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term or condition of the license to the contrary . . .

Specifically, the staff required information regarding the technical operation of the station and a description of the nature or type of programming aired during the Station's brief return to air.

¹ *ETC Communications, Inc., c/o Nathaniel J. Hardy, Esq.*, 24 FCC Rcd 3021 (Vid. Div. 2009) ("ETC Communications").

² FCC File No. BLSTA-20070308ABE.

³ 47 U.S.C. § 312(g).

In its May 20, 2008 response to the staff's information request, ETC stated that the station returned to the air for a 24-hour period between February 3 and February 4, 2008, with the facilities authorized in its current FCC license, and that it broadcast a test pattern for the entire period. Based upon that information, the Division found that the Station had been silent for more than a consecutive 12-month period, stating that "it is well settled that conducting equipment tests or transmitting an equipment test pattern does not prevent the automatic expiration of a license pursuant to Section 312(g)."⁴ In support, the Division cited to the Commission's decision in *A-O Broadcasting Corporation*, which held that equipment tests "are not transmissions of broadcast signals as required by Section 312(g)."⁵

ETC filed a timely petition for reconsideration, arguing, first, that the Division's conclusion that test patterns do not qualify as broadcast service for the purposes of Section 312(g) is not supported by one of the cases cited by the Division. ETC also argues that the facts here are distinguishable from those in *A-O Broadcasting* because the Station transmitted a test pattern from its authorized licensed facility, while the licensee in *A-O Broadcasting* conducted equipment tests from an unauthorized facility.

In the alternative, ETC maintains that equity and fairness would be served by reinstatement of the license. Section 312(g) gives the Commission the discretion, following an automatic forfeiture, to reinstate a license "if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness." ETC argues that because the Commission has previously held that a station that was silent for more than a consecutive 12-month period due to natural disaster may warrant reinstatement, its license should also be reinstated because ETC "has undergone a personal disaster that is equal to a natural disaster."⁶ In support, it states that the Station has struggled financially since ETC acquired it out of bankruptcy in the mid-1990's and that in 2005, the entity which provided most of the Station's programming terminated its contract, leaving the station without programming for much of prime time. After one of the principals of ETC died in December 2005, ETC's remaining principal determined that she could no longer run the station and engaged a media broker to sell the Station. While the Station was silent, ETC entered into an asset purchase agreement to sell the Station to WYLE TV, LLC ("WTL"),⁷ and according to the terms of the Asset Purchase Agreement dated July 23, 2007, received a non-refundable deposit of \$100,000 to be credited against the purchase price.⁸ Thus, ETC requests that the license be reinstated so that the station may be sold.

Discussion. We have carefully considered ETC's petition for reconsideration and conclude that no basis exists for granting reconsideration of our previous decision. Section 312(g) provides that the license of a broadcasting station that fails to transmit broadcast signals for any consecutive 12-month period expires automatically at the end of that period. With respect to ETC's argument that one of the decisions cited by the Division did not, in fact, include a finding that test patterns do not qualify as broadcast service for the purpose of Section 312(g),⁹ the Commission's subsequent decision in *A-O*

⁴ *ETC Communications*, 24 FCC Rcd at 3022.

⁵ *A-O Broadcasting Corporation*, 23 FCC Rcd 603, 609 (2008).

⁶ ETC Petition for Reconsideration at p. 5.

⁷ Because WTL is commonly owned with the licensee of WHDF(TV), Florence, Alabama, and there are less than eight independently owned and operating television stations licensed to the Huntsville-Decatur, Alabama DMA, the parties filed a failed station duopoly waiver request. See 47 C.F.R. §73.3555(b) (2002) and FCC File No. BALCT-20070802ADK. Shortly thereafter, ETC filed an application for modification of its digital construction permit to collocate WYLE-DT with WHDF(DT)'s transmission site. FCC File No. BMPCDT-20070920ABE.

⁸ FCC File No. BALCT-20070802ADK, Attachment 11, Asset Purchase Agreement, Article 1.4.

⁹ In addition to *A-O Broadcasting*, the Division cited to *Carlos J. Lastra, Trustee*, Memorandum Opinion and Order, 16 FCC Rcd 17268 (2001), *aff'd sub nom. per curiam, Aerco Broadcasting Corp. v. FCC*, 51 Fed. Appx. (D.C. Cir.

Broadcasting explicitly holds that “conducting equipment tests or transmitting an equipment test pattern does not prevent the automatic expiration of a license pursuant to Section 312(g).”¹⁰ The Commission’s decision in *A-O Broadcasting* was released before ETC transmitted a test pattern in February 2008, and affirmed January 2003 staff rulings that test transmissions do not constitute “broadcast signals” and thus, did not prevent automatic forfeiture of a license.¹¹ Accordingly, we conclude that Commission licensees were on clear notice in February 2008 of the Commission’s policy that transmitting an equipment test pattern was insufficient to establish a break in a station’s silence for the purpose of Section 312(g). We also note that regardless of whether the Station was operating on February 3, 2008, in such a capacity as to have met the requirements of Section 312(g) of the Act, it admittedly did not operate in any capacity between February 4, 2008, when it ceased transmissions, and March 12, 2009, when the Division released its decision concluding that the Station license had expired.

With respect to ETC’s argument that it transmitted a test pattern from its authorized facility, unlike the licensee in *A-O Broadcasting*, we do not find this distinction dispositive. In *A-O Broadcasting*, the licensee first notified the Commission that it had conducted signal tests in order to break the station’s silence, and the staff ruled that these transmissions did not constitute “broadcast signals.”¹² On reconsideration before the staff, the licensee presented new evidence, alleging that it also aired six or seven songs and two pre-recorded station identification announcements before its power system failed.¹³ The staff also rejected this alleged reactivation of the station as satisfying Section 312(g), concluding that crediting an unauthorized transmission as sufficient to prevent cancellation under Section 312(g) would be inconsistent with the purpose of the Act.¹⁴ On further reconsideration, the Commission agreed with the staff that unauthorized transmissions were insufficient to avoid license expiration, and also explicitly rejected the licensee’s “alternative” argument that transmission of signal tests satisfied Section 312(g), even where the test signals were audible to the public.¹⁵

Based upon the foregoing, we conclude that the described resumption of station operations was insufficient to exempt ETC from automatic expiration of the Station’s license pursuant to Section 312(g), and that the Station clearly had been silent for more than a consecutive 12-month period prior to the Division’s March 12, 2009 letter decision. We also conclude that ETC has failed to demonstrate circumstances that warrant exercise of our discretion under Section 312(g) to reinstate a license “to promote equity and fairness.” In the past, the Commission has exercised its discretion in cases involving natural disaster or other compelling circumstances outside of the licensee’s control which forced cessation of the station’s operations. For example, in *V.I. Stereo Communications Corp.*,¹⁶ the Commission on reconsideration concluded that the station’s extended silence was understandable and that reinstatement was warranted, given the fact that the station’s tower had been completely destroyed by a hurricane and after it was rebuilt, again sustained substantial damage from three more hurricanes. In another case, the staff reinstated an expired permit when the station’s extended silence was the result of the licensee’s compliance with an order issued by a state court.¹⁷

2002), as support for the proposition that transmitting a test pattern does not constitute broadcasting for the purpose of Section 312(g).

¹⁰ *A-O Broadcasting*, 23 FCC Rcd at 608.

¹¹ *Letter to Paul H. Brown, Esq.*, 18 FCC Rcd 35 (Aud. Div.), *recon. denied*, 18 FCC Rcd 3818 (Aud. Div. 2003); *review denied*, *A-O Broadcasting Corporation*, 23 FCC Rcd 603 (2008).

¹² *Letter to Paul H. Brown, Esq.*, 18 FCC Rcd at 36.

¹³ *Letter to Paul H. Brown, Esq.*, 18 FCC Rcd at 3819.

¹⁴ *See A-O Broadcasting*, 23 FCC Rcd at 608.

¹⁵ *Id.* at 609.

¹⁶ *V.I. Stereo Communications Corp.*, 21 FCC Rcd 14259 (2006).

¹⁷ *Letter to Mark Chapman, Court-Appointed Agent*, 22 FCC Rcd 6578 (Aud. Div. 2007)

Here, ETC has not demonstrated natural disasters or other compelling circumstances which forced the station to cease operations. Instead, ETC made a business decision, based upon its stated “inability to finance the operations of WYLE,”¹⁸ to take the station off the air in February 2007. ETC later determined not to resume broadcasting, despite having received a substantial non-refundable deposit from WTL, the Station’s prospective buyer, in July 2007. We believe that the facts here are similar to cases where Commission staff declined to exercise its discretion under Section 312(g) of the Act. For example, in *Kirby Young*,¹⁹ an AM radio station’s transmitter failed in 2002 and the licensee represented that it did not have the financial resources to return the station to the air. The licensee later entered into an agreement to sell the station and contended that fairness and equity would be served by reinstating the license so that the station could be sold to a potential buyer. The staff disagreed, finding no claim that “natural disasters or other compelling circumstances forced the cessation of the Station’s operations.” Similarly, in *Family Life Ministries*, the staff declined to exercise its discretion under Section 312(g) where the station was taken off the air “due to [the licensee’s] desire to meet its goals for the station in a more economical manner.”²⁰ Thus, in accordance with precedent, we decline to exercise our discretion under the Section 312(g) “equity and fairness” provision to reinstate ETC’s license which expired by operation of law due to circumstances within ETC’s control.

Accordingly, having concluded that ETC has failed to present any facts or arguments that warrant reconsideration and reinstatement of the authorization for its expired license at Florence, Alabama, the petition for reconsideration filed by ETC Communications, Inc. IS HEREBY DENIED.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau

cc: Mark Prak, Esq.

¹⁸ ETC Petition for Reconsideration at p. 5.

¹⁹ *Kirby Young*, 23 FCC Rcd 35 (Aud. Div. 2008).

²⁰ *Letter from Peter H. Doyle, Chief, Audio Division, to Family Life Ministries, Inc.*, 2009 WL 4722111 (rel. Oct. 8, 2008); *see also Letter to Mr. Zacarias Serrato*, 20 FCC Rcd 17232 (Aud. Div. 2005) (Staff refused to exercise its discretion under 312(g), finding that the licensee’s failure to return the station to service within 12 months was due to its business decision not to find an alternative transmitter site promptly due to cost).